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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 164

ALD M. HILL, JAY R. BENTON, AND GEORGE B. ILLINGS, EXECUTORS OF THE WILL OF WARREN . HILL, PETITIONERS,

vs.

CHARLES S. SMITH.

RIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1923.

CERTIORARI AND RETURN FILED JANUARY 4, 1923.

(28,465)

(28,465)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 510.

DONALD M. HILL, JAY R. BENTON, AND GEORGE B. BILLINGS, EXECUTORS OF THE WILL OF WARREN M. HILL, PETITIONERS,

vs.

CHARLES S. SMITH.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered 1 to 28 inclusive, of the files, records, and proceedings of the said Superior Court, is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonthwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of jadicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL, *Clerk.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye, that among our records of our Superior Court for the said County of Suffolk it is thus contained, the following being the entire record in the case.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

[SEAL.]

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Warren M. Hill of Boston, within our County of Suffolk, to the value of ten thousand dollars and summon the said Hill (if he may be found in your precinct) to appear before our Justices of our Superior Court, to be holden at Boston, within and for our said County of Suffolk,
on the first Monday of May next, then and there in our said
2 Court to answer unto Charles S. Smith of Lincoln in our County of Middlesex,

In an Action of Contract.

Declaration.

And the plaintiff says that by the consideration of our Justices of our said Court holden at Boston aforesaid within and for our said County of Suffolk, to wit, on the second day of May, A. D. 1904, he recovered judgment against the defendant for the sum of four thousand four hundred and seventy-eight dollars damages and nineteen and 79/100 dollars costs of suit as appears of record; that said judgment remains in full force and effect; and that said judgment has not been satisfied either in whole or in part.

CHARLES S. SMITH,
By His Attorney, PRESTON KEYES.

To the damage of the said Smith (as he says) the sum of ten thousand dollars, which shall then and there be made to appear, with other due damages. And whereas the said Smith says, that the said Hill has not, in his own hands and possession, goods and estate to the value of ten thousand dollars aforesaid, which can be come at
3 to be attached, but hath intrusted to and deposited in the hands and possession of Donald M. Hill, Calvin Austin and Henry C. Wiley, all having usual places of business in said Boston, as they are the executors of the will of William H. Hill, who at the time of his decease had a usual place of business in said Boston, Trustees of the said Defendant goods, effects and credits, to the said value: we command you, therefore, that you summon the said supposed Trustees (if they may be found in your precinct), to appear before our Justices of our said Court, to be holden as aforesaid, to show cause, if any they have, why execution to be issued upon such judgment as the said Plaintiff may recover against the said Defendant in this action (if any) should not issue against his goods, effects or credits, in the hands and possession of the said Trustees.

And have you there this writ with your doings therein.

Witness, John A. Aiken, Esquire, at Boston, the thirtieth day of March, in the year of our Lord one thousand nine hundred and fourteen.

FRANCIS A. CAMPBELL,
Clerk.

On which said writ return of service was made in the words and figures following, to wit:

4 "SUFFOLK, *ss:*

Boston, April 1st, 1914.

By virtue of this writ, I this day summoned the within named trustees Donald M. Hill, Calvin Austin and Henry C. Wiley, Executors as within described, to appear and show cause at Court as within directed, by delivering at eleven o'clock A. M., to said Hill and said Wiley and by delivering thirty minutes past twelve o'clock P. M. to said Austin each an attested copy of this writ and on the seventeenth day of April, 1914, I attached a chip as the property of the within named defendant Warren M. Hill and afterwards on the same day summoned said defendant to appear and answer at Court as within directed, by delivering to him in hand an attested copy of this writ.

JEREMIAH G. FENNESSEY,
Deputy Sheriff."

Fees:

Service	4.00
Copies	4.00
Travel	.10
	$8.10

On said first Monday of May, A. D. 1914, the Plaintiff appeared by Prescott Keyes, Esq., his attorney, as aforesaid, and entered the above entitled action.

Thereafter on the sixth day of May, in said year, the following appearance in writing was entered, to wit:

5 *Appearance.*

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191—.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft.

In the above action I appear for defendant.

IRVING F. CARPENTER,
78 Devonshire St., Boston.

And on the twelfth day of said May, 1914, the following appearance in writing was entered, to wit:

Appearance.

SUFFOLK, *ss:*

Superior Court, —— sitting, 1914.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft., and DONALD M. HILL, CALVIN AUSTIN, and Henry C. Wiley, as Executors of the Will of William H. Hill, Alleged Trustees.

In the above action we appear for Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of the will of William H. Hill, alleged Trustees.

BLODGETT, JONES, BURNHAM & BINGHAM.

Also on said twelfth day of May, 1914, said Trustees filed their sworn answer, as follows, to wit:

6 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

CHARLES S. SMITH, Plaintiff,

v.

WARREN M. HILL, Defendant, and DONALD M. HILL, CALVIN AUSTIN, and Henry C. Wiley, as executors of the Will of William H. Hill, Alleged Trustees.

Trustees' Answer.

And now come Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of the will of William H. Hill, alleged trustees of the defendant in the above entitled action, and for answer say that at the time of the service of the plaintiff's writ upon them they had not in their hands or possession any goods, effects or credits of said defendant.

DONALD M. HILL.
CALVIN AUSTIN.
HENRY C. WILEY.
Executors of the Will of William H. Hill.

SUFFOLK, *ss:*

Boston, May 6, 1914.

Personally appeared the above named Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of the will of William H. Hill, and made oath that the above answer is true.

Before me,

DANA T. GALLUP,
Justice of the Peace.

7 Subsequently on the third day of June, 1914, said Defendant filed his answer, as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

#79103.

CHARLES S. SMITH

vs.

WARREN M. HILL & Trustees.

Answer of Defendant Warren M. Hill.

Now comes the defendant in the above entitled action and denies each and every material allegation, item and particular in the plaintiff's writ and declaration contained. And further answering the defendant says that by virtue of proceedings instituted in the United States District Court for the District of Massachusetts on the twentieth day of June, 1912 under the provisions of the act of Congress of July 1, 1898, entitled "The Bankruptcy Act," the defendant was discharged on December 3, 1912 from all debts and claims including the plaintiff's claim (if any) against this defendant which were provable against his estate in bankruptcy.

A true copy of the original certificate of discharge is hereto annexed.

WARREN M. HILL,
By His Attorney, IRVING F. CARPENTER.

Attached to the foregoing Answer is the following, to wit:

8 District Court of the United States, District of Massachusetts.

Whereas, Warren M. Hill of Boston in said District, has been duly adjudged a bankrupt, under the Acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this Court that said Warren M. Hill be discharged from all debts and claims which are

made provable by said Acts against his estate, and which existed on the 20th day of June, A. D. nineteen hundred and twelve, on which day the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable James M. Morton, Jr., judge of said district court, and the seal thereof this 3rd day of December, A. D. 1912.

[L. S.] MARY E. PRENDERGAST,
Deputy Clerk.

I, Charles K. Darling, Clerk of the District Court of the United States, for the District of Massachusetts, hereby certify that
9 the foregoing is a true copy of the original certificate of discharge.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the said court, this 19th day of May A. D. 1914

[SEAL.] CHARLES K. DARLING,
Clerk.

On the twelfth day of June 1914, said defendant filed his claim for a trial by jury as follows, to wit:

Jury Claim.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191–.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft.

In the above action I claim a trial by jury.
IRVING F. CARPENTER,
Attorney for Defendant.

Thence the case was continued from time to time unto the fifteenth day of March 1915, when on said day, the plaintiff filed his Affidavit of No Defense as follows, to wit:

10 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

CHARLES S. SMITH

vs.

WARREN M. HILL and Trustees.

Affidavit of no Defence.

I, Charles S. Smith, the plaintiff in the above entitled action on oath declare that the statements contained in the declaration in said action are true, that in my belief there is no defence to said action, that the schedule filed by the defendant in the bankruptcy proceedings referred to in the defendant's answer does not contain my name which was known to said defendant, and that I did not have notice nor actual knowledge of said proceedings.

CHARLES S. SMITH.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

March 12, 1915.

Then personally appeared the above-named Charles S. Smith and made oath to the truth of the foregoing affidavit by him subscribed before me,

JOHN A. McNAMARA,
Justice of the Peace.

11 Whereupon the following Order issued by the Court, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court, January Sitting, 1915, viz., March 15, 1915.

CHARLES S. SMITH

vs.

WARREN M. HILL & Trustees.

And now in the above action the Plaintiff, on the fifteenth day of March A. D. 1915, having filed an affidavit verifying the cause of action, and swearing in his belief there is no defence, it is ordered

that the Defendant forthwith show cause in writing and under oath why judgment should not be given for the Plaintiff.

FRANCIS A. CAMPBELL,
Clerk.

Acts 1911, Chap. 305.

Afterward, to wit: on the nineteenth day of said March 1915, the aforesaid order was returned into Court with the following endorsed thereon, to wit:

12 SUFFOLK, *ss:*

Boston, March 18th, 1915.

I have this day notified the within-named defendant (as provided by the Acts of 1911, Chap. 305) of the within order by mailing, postage prepaid, to Warren M. Hill, The Fenway 10, Boston, Massachusetts a copy of the within order.

PRESCOTT KEYES,
Attorney for Plaintiff.

Subscribed and sworn to before me, this eighteenth day of March 1915.

[SEAL.] EDITH MELVIN,
Special Commissioner.

And thereupon, on the twenty-fifth day of March 1915, said defendant filed his Affidavit of Defence as follows, to wit:

13 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

#79103.

CHARLES S. SMITH

vs.

WARREN M. HILL & Trustees.

And now comes the defendant in the above entitled action and on oath says that in his belief there is a good defence to said action, namely that by virtue of proceedings instituted in the United States District Court for the District of Massachusetts on the 20th day of June, 1912, under the provisions of the Act of Congress of July 1, 1898 entitled "The Bankruptcy Act" the defendant was discharged on December 3, 1912 from all debts and claims including the plaintiff's claim (if any) against the defendant which were provable against his estate in bankruptcy. And the defendant says that he relies upon said discharge in bankruptcy as a defence to this action and that a true copy of the original certificate of discharge is an-

nexed to and made a part of his answer duly filed in this cause of action.

WARREN M. HILL.

SUFFOLK, *ss:*

March 24, 1915.

Then personally appeared the above named Warren M. Hill and made oath that the foregoing affidavit by him subscribed is true, before me.

IRVING F. CARPENTER,
Justice of the Peace.

Thence the suit was continued from time to time, unto the fifth day of May 1916, when, on said day, the Plaintiff filed the following suggestion of Death and motion to cite in Executors, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

SMITH

vs.

HILL.

And now the plaintiff suggests the death of the principal defendant and prays that Donald Mackay Hill of Newton, Jay R. Benton of Belmont and George B. Billings of Boston, all within said Commonwealth, as they are the executors of the will of said defendant may be summoned in to defend.

CHARLES S. SMITH,
By His Attorney, PRESCOTT KEYES.

And the following was endorsed thereon, to wit:

SUFFOLK, *ss:*

Boston, May 5, 1916.

Mo. Allowed by the Court. Process for service ord-d to issue.

Attest:
H. E. BELLEW,
Ass't Clerk."

Whereupon the following Order — issued by the Court, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court, April Sitting, A. D. 1916, to wit., May 5, 1916.

On the foregoing Motion Ordered, that the Plaintiff give notice to said Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, to appear at said Court to be held at Boston, within and for said County, on the first Monday of June next, by serving
16 them with a true and attested copy of said motion with this Order thereon, fourteen days at least before said first Monday of June that they may then and there appear and defend said action if they see fit.

By the Court,

FRANCIS A. CAMPBELL,
Clerk.

Subsequently, on the twenty-third day of May, 1916, a copy of the aforesaid Suggestion of Death and motion to cite in Executors to defendant said action, with Order attached thereto, was returned into Court with the following return and acceptance of service endorsed thereon, to wit:

"SUFFOLK, *ss:*

Boston, May 10th, 1916.

I this day served the within Motion and Order of Court thereon, upon the within named respondents, Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, by delivering to Messrs. Blodgett, Jones, Burnham & Bingham, their Attorneys, an attested copy hereof for each of said respondents.

PETER P. FEE,
Deputy Sheriff."

Fees:

Service	3.00
Copies	3.00
Travel	.10
	$6.10

17 "Due and sufficient service of the within Motion and Order of Court is hereby accepted for the within named Jay R. Benton and George B. Billings, Executors.

By Their Attorney-, BLODGETT, JONES, BURNHAM & BINGHAM."

May 10, 1916.

On the thirteenth day of June 1916, the following appearance in writing was entered, to wit:

Appearance.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191-.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

WARREN M. HILL, Dft.

In the above action I appear for Donald Mackay Hill, Jay R. Benton, Geo. B. Billings, Exors.

IRVING F. CARPENTER,
78 Devonshire St.

18 Thence the case was continued from time to time, unto the first day of October 1917, when, on said day, said defendant waived his claim for a trial by jury as follows, to wit:

Jury Claim.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 191-.

No. 79103.

SMITH, Plff.,

v.

HILL, Dft.

In the above action the deft. waives a trial by jury.

IRVING F. CARPENTER,
Attorney for Deft.

Thence the suit was continued unto the fifteenth day of November 1917, when, on said day, the case having been submitted to the Court, after a full hearing, the Court found as follows, to wit.

SUFFOLK, *ss:*

Superior Court, October Sitting, 1917.

CHARLES S. SMITH, Plff.,

—

WARREN M. HILL, Deft.

The Court finds for the Plaintiff, and assesses damages in
19 the sum of Eight thousand one hundred and fifty dollars ($8,150.00).

JOHN A. AIKEN,
Chief Justice of the Superior Court.

Whereupon on the fourth day of December 1917, said defendants proposed exceptions as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

#79103.

CHARLES S. SMITH

vs.

DONALD MACKAY HILL et als., Ex'ors & Trs.

Defendants' Bill of Exceptions.

This is an action of contract brought by writ dated March 30, 1914 on a judgment for Four Thousand four hundred seventy-eight ($4,478.00) dollars secured by the plaintiff on the second day of May A. D. 1904 against Warren M. Hill, late of Boston, Massachusetts. The plaintiff's declaration did not state the cause of action upon which the judgment was founded. The defendant's answer set up a discharge in bankruptcy on December 3, 1912 and a duly authenticated copy of the original certificate of discharge was annexed to the answer. After commencement of the suit and before
20 trial Warren M. Hill died (October 26, 1915) and the action is now defended by his executors who were cited in by the plaintiff. The pleadings may be referred to.

At the trial the plaintiff read the pleadings, introduced in evidence a certificate of the clerk of the Superior Court for the county of Suffolk which showed that the judgment remained unsatisfied, and rested.

The defendants introduced in evidence a certified copy of the discharge in bankruptcy of Warren M. Hill and rested. The plaintiff introduced in evidence in rebuttal a certified copy of the schedule of

creditors in bankruptcy of Warren M. Hill in which schedule the name of the plaintiff Charles S. Smith did not appear. No evidence other than the foregoing was introduced by either party.

The defendants then submitted the following requests for rulings:

1. The certified copy of the defendant's discharge in bankruptcy on the facts in this case is prima facie evidence that the plaintiff's debt was properly scheduled and that the plaintiff was duly notified of the defendant's bankruptcy.

2. The burden is upon the plaintiff to show that his debt or judgment was not scheduled according to law in the defendant's list of claims filed in the bankruptcy Court prior to his discharge
21 in bankruptcy.

3. The burden is upon the plaintiff to show that he was not notified of the defendant's bankruptcy.

4. The burden is upon the plaintiff to show that he had no knowledge of the defendant's bankruptcy.

5. If you find that claims on the notes which were merged in the plaintiff's judgment were scheduled by the defendant in the name of the original payee of the notes, then the plaintiff's claim was properly scheduled.

6. In arriving at a finding in this case the Court must assume unless by a preponderance of the evidence the plaintiff has shown otherwise, that the bankruptcy proceedings of the defendant prior to and at the time of the adjudication of discharge were in all respects regular and in compliance with every requirement of the bankruptcy law.

7. The plaintiff's claim was a provable debt under the bankruptcy Act.

The word "defendant" in the foregoing requests refers to the original defendant Warren M. Hill. The fifth request of the
22 defendants was waived at the trial. The court gave the defendants' requests numbered 1, 2, 6 and 7 but refused requests numbered 3 and 4. To such refusal the defendants duly excepted. Thereupon court found for the plaintiff in the amount of Eighty-one hundred and fifty dollars and the defendants being aggrieved by such finding and by the refusal to rule as requested, and having duly excepted now pray that their exceptions may be allowed.

By Their Attorney, IRVING F. CARPENTER.

And the following were endorsed on said defendants' Bill of Exceptions, to wit:

"Exceptions allowed.

JOHN A. AIKEN,
C. J. S. C."

"The within bill of exceptions may be allowed.

PRESCOTT KEYES,
Atty. for Plaintiff."

On the seventh day of March, 1918, notice was sent to all attorneys and to Aiken, Chief Justice, Under Rule 54.

And on the twelfth day of March, in said year, the following was endorsed on the aforesaid Bill of Exceptions, to wit:

"Mar. 12, '18.

Allowed & filed.
Att.:

F. P. EWING,
Asst. Clk."

23 Thence the suit was continued, from time to time, unto the twenty-eighth day of February, 1919, when, on said day, the following Rescript was received in our said Superior Court, to wit:

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Feb. 27, 1919.

In the Case of

CHARLES S. SMITH

vs.

DONALD MACKAY HILL et als., Ex'ors & Trs.,

pending in the Superior Court for the County of Suffolk.

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Exceptions overruled.

By the Court,

C. H. COOPER,
Clerk.

February 27, 1919.

The reasons of the decision are set forth at length in the opinion filed herewith, to which reference is made.

24 Thence the suit was continued from time to time, unto the fourth day of June 1921.

And now, on the day and year last aforesaid, the following appearance in writing is entered, to wit:

Appearance.

SUFFOLK, *ss:*

Superior Court, —— Sitting, 192-.

No. 79103.

CHARLES S. SMITH, Plff.,

v.

DONALD M. HILL et al., Dfts.

In the above action we appear for plaintiff.
DUNBAR, NUTTER & McCLENNEN,
161 Devonshire St.

Also on said fourth day of June 1921, said plaintiff discharges said Trustees as follows, to wit:

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

CHARLES S. SMITH

v.

DONALD M. HILL et al.

Discharge of Trustees.

Now comes the plaintiff in the above entitled action and discharges the Trustees therein.
By His Attorneys, DUNBAR, NUTTER & McCLENNEN.

And on the sixth day of June, A. D. 1921, it is considered and ordered by the Court that Charles S. Smith, Plaintiff as aforesaid, recover against the estate of Warren M. Hill, in the hands and possession of Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, as aforesaid, the sum of nine thousand eight hundred and ninety-one dollars and thirty-eight cents damages; and costs of suit against said Executors, taxed at eighty-three dollars and fifty-three cents.

And on said sixth day of June, A. D. 1921, it is considered and ordered by the Court that Donald M. Hill, Calvin Austin and Henry C. Wiley (as they are the Executors of the Will of William H. Hill), Trustees as aforesaid, recover against **Charles S. Smith,**

Plaintiff as aforesaid, their costs of suit taxed at five dollars and thirty-three cents.

Executions, in favor of said plaintiff versus said estate and said Executors, issued June 8th, 1921.

26 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, John A. Aiken, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this fourteenth day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

27 *Docket Entries.*

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

No. 79103.

CHARLES S. SMITH

vs.

DONALD MACKAY HILL et al., Executors and Trustees.

Counsel for plaintiff: Prescott Keyes, Dunbar, Nutter & McClennen, June 4, 1921.

Counsel for defendant: Irving F. Carpenter and for executors, June 13, 1916.

Trustees: 1, Donald M. Hill, 2, Calvin Austin, 3, Henry C. Wiley, executors; 4, 5, 6.

Counsel for Trustees: 1, Blodgett, Jones, Burnham & Bingham; 2, 3, 4, 5, 6.

[J]* and waived.

Action of contract.

Ad damnum, $10,000.

Disposed of April Sitting, 1921.

Trial List, Oct. Gen., 1917.

[*Letter erased.]

Date.	No.	
1914.		
4 May.	..	Entered. Declaration filed.
May 12.	1	Answer of Trustees Hill, Austin & Wiley.
June 3.	2	Defendant's answer.
June 12.	3	Defendant's jury claim.
1915.		
Mch. 15.	4	Plaintiff's affidavit of no defence and order issued.
Mar. 19.	5	Order returned.
Mar. 25.	6	Defendant's affidavit of defence.
28–30		
1916.		
May 5.	7	Plaintiff's suggestion of defendant's death and motion to cite in Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors, to defend, allowed and process for service ordered to issue and notice to executors issued returnable first Monday June, 1916.
May 23.	8	Order returned.
1917.		
Oct. 1.	9	Defendants' waiver of jury claim.
Nov. 15.	10	Court finds for plaintiff and assesses damages in the sum of $8,150.00.
Dec. 4.	..	Defendants' proposed exceptions.
1918.		
Mar. 7.	..	Notice to all attorneys and Aiken, Chief Justice, under Rule 54.
Mch. 12.	11	Defendants' exceptions allowed and filed.
1919.		
Feb. 28.	12	Rescript from Supreme Judicial Court—"Exceptions overruled."
1921.		
June 4.	13	Plaintiff's discharge of trustees.
June 6.	..	Judgment for Plaintiff— Damages, $9,891.38 vs. estate. Costs, $83.53 vs. executors. Execution June 8th, 1921.
June 6.	..	Judgment for Trustees— Costs, $5.33.

(July 14th, A. D. 1921.)
Copy.

Attest:

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

31 COMMONWEALTH OF MASSACHUSETTS:

Boston, July 7, 1921.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Charles S. Smith vs. Donald M. Hill & others, executors, decided on the 27th day of February, 1919.

ETHELBERT V. GRABILL.
Reporter of Decisions.

ETHELBERT V. GRABILL.

32 RUGG, *C. J.*:

This is an action upon a judgment recovered against Warren M. Hill on May 2, 1904. The defence is a discharge in bankruptcy. After the commencement of this action the defendant died and the defence is conducted by his executors. The plaintiff introduced evidence that the judgment was unsatisfied and rested. The defendants introduced a certified copy of the discharge of Warren M. Hill granted on December 3, 1921, and rested. The plaintiff then showed in rebuttal a certified copy of the schedule of creditors in bankruptcy filed by Warren M. Hill, in which the name of the plaintiff did not appear. There was no further evidence. The judge ruled as requested by the defendants (1) that the certified copy of the discharge in bankruptcy made a prima facie case that the plaintiff's
33 case was properly scheduled and that he was duly notified of the debtor's bankruptcy, (2) that the burden was upon the plaintiff to show that his debt or judgment was not scheduled according to law in the bankruptcy court, (3) that the bankruptcy proceedings were regular, and (4) that the plaintiff's claim was provable in bankruptcy; but refused to rule that the burden was upon the plaintiff to show that he was not notified of the debtor's bankruptcy and had no knowledge thereof, and found for the plaintiff. The case comes here on the defendants' exceptions to the refusals to rule, and to the finding. The questions presented relate wholly to the burden of proof.

The statement of the general rule as to the burden of proof is plain. The plaintiff, by asserting in his declaration facts which if proved establish a liability to him on the part of the defendants, has the burden of proving those facts. It was said by Chief Justice Shaw in Powers v. Russel, 13 Pick. 69, at pages 76, 77, that "Where the party having the burden of proof establishes a prima facie case, and no proof to the contrary is offered, he will prevail. Therefore the other party, if he would avoid the effect of such prima facie case, must produce evidence, of equal or greater weight, to balance and control it, or he will fail. Still the proof upon both sides applies to the affirmative or negative of one and the same issue, or proposition of fact; and the party whose case requires the proof of that fact, has all along the burden of proof. It does not
34 shift, though the weight in either scale may at times preponderate. But where the party having the burden of proof gives competent and prima facie evidence of a fact, and the adverse

party, instead of producing proof which would go to negative the same proposition of fact, proposes to show another and a distinct proposition which avoids the effect of it, there the burden of proof shifts, and rests upon the party proposing to show the latter fact." Hughes v. Williams, 229 Mass. 467, and cases collected. See Commonwealth v. Thurlow, 24 Pick. 374, 380, 381.

Applying this rule to the case at bar, it is clear that the plaintiff made out his case by the production of his judgment. The defendants did not attack that case but sought to avoid its force by proof of another independent distinct and subsequent fact, namely, that after the rendition of the judgment Warren M. Hill had received a discharge in bankruptcy. That raised a new issue. It was an affirmative defence. The burden of proving it rested on the defendants as the parties alleging it. That burden required the proof of a discharge granted under such circumstances as would bar the plaintiff's judgment. The judge ruled that prima facie that burden was sustained by proof of the discharge in bankruptcy. But that ruling was not and could not rightly have been to the effect that the burden of proof was shifted to the plaintiff upon any phase of the discharge in bankruptcy. As was said by Bigelow, J., in
35 Central Bridge Corp. v. Butler, 2 Gray, 130, at page 132, "The burden of proof and the weight of the evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established." A prima facie case or prima facie evidence does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. Carroll v. Boston Elevated Railway, 200 Mass. 527, 536. The burden of proof continues to rest upon the party who either as plaintiff or as defendant asserts the fact necessary to enable him to prevail. He must ultimately establish that fact before he can become entitled to a finding or verdict in his favor, and the burden rests on him to do that, whatever may be the intervening effect of different kinds of evidence or evidence possessing under the law the varying degrees of probative value.

The pleading by the defendants of the discharge in bankruptcy as a bar to the plaintiff's claim imposed on them the burden of proving it. Whatever might be the prima facie effect of evidence of the discharge in bankruptcy granted by a court of competent jurisdiction, the burden of proof did not change to the plaintiff on that point, for the reason that the assertion of bankruptcy
36 as a bar was not a part of the plaintiff's case, but on the issues raised by the pleadings was alleged by the defendants as a separate, subsequent fact in avoidance of the plaintiff's claim. Hence the burden of proving a discharge of such nature and granted under such circumstances as would bar the plaintiff's claim was assumed by the defendants under the pleadings and it rested upon them to the end. Wylie v. Marinofsky, 201 Mass. 583.

This conclusion is supported in principle by Parker v. Murphy, 215 Mass. 72, 75. It seems to us to be supported by the greater weight of well reasoned decisions in other jurisdictions. Bailey v. Gleason, 76 Vt. 115, 118. Wineman v. Fisher, 135 Mich. 604, 608. Sloan v. Grollman, 113 Md. 192, 194. Calmenson v. Moudry, 137 Minn. 123, 125. Armstrong v. Sweeney, 73 Neb. 775. Bogart v. Cowboy State Bank & Trust Co. 182 S. W. Rep. 678, 682. Bunting Stone Hardware Co. Inc. v. Alexander, 190 S. W. Rep. 1152, 1153. There are, however, contrary decisions. Alling v. Straka, 118 Ill. App. 184. Matter of Peterson, 137 App. Div. (N. Y.) 435. Merchants Bank of Brooklyn v. Miller, 176 App. Div. (N. Y.) 412; affirmed without opinion in 221 N. Y. 490. Laffoon v. Kerner, 138 N. C. 281, 285. Other decisions respecting the burden of proving that the nature of the plaintiff's claim is such as not to be within the bar of a discharge in bankruptcy are not necessarily inconsistent with this result. Gatliff v. Mackey, 31 Ky. Law. Rep. 947. Van Norman v. Young, 228 Ill. 425. Hallagan v. Dowell,
37 139 N. W. Rep. 883. Roden Grocery Co. v. Leslie, 169 Ala. 579, related to a question of pleading. The distinction between the burden of proof, the weight of evidence and the prima facie effect of a discharge in bankruptcy does not seem to have been clearly drawn in them.

An analysis of s. 17 *a* (3) of the bankruptcy act of 1898, c. 541 (30 U. S. Sts. at Large, 550), as amended by U. S. St. 1903, c. 187, s. 5 (32 U. S. Sts. at Large, 798), confirms this view. It is as follows: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." The fair implication of these words is that the person who asserts the force of the discharge as a bar must show in those instances where the debt has not been scheduled as required by the law and hence is within the exception to the bar of the discharge in bankruptcy, that nevertheless the debt is barred because within the excepted class of such unlisted debts belonging to creditors who either had notice or actual knowledge of the proceedings. In such cases it is only when a creditor is shown to belong to a class particularly excepted out of a class more generally excepted that the discharge in bankruptcy becomes a bar. A special exception is thus grafted upon another exception to the chief proposition that in the main a discharge in bankruptcy relieves the debtor from legal obligation to his
38 creditors. The burden of showing an exception as a relief from the apparent force of a written instrument rests upon the party asserting it in many kinds of cases. See, for example, A. J. Tower Co. v. Southern Pacific Co. 184 Mass. 472; Nichols v. Commercial Travellers' Eastern Accident Association, 221 Mass. 540, 546; Hughes v. Williams, 229 Mass. 467, 471. See Commonwealth v. Boyer, 7 Allen, 306. That principle would seem to be equally applicable to an exception to a general principle.

This conclusion is consonant with natural justice. A discharge in bankruptcy under the terms of s. 17 of the bankruptcy act is a bar to debts because creditors have had an opportunity to be heard in the bankruptcy courts upon the various matters there in litigation, have had the privilege of proving their claims and of sharing in the distribution of the assets of their debtors. Their claims thus have become res judicata. This result ensues from the basic proposition that the bankruptcy court acquired jurisdiction of the creditor, who thus has had his day in court. But if the creditor, through no fault of his own but wholly through the fault of the debtor upon whom is cast that duty by the law, has no notice or knowledge of the opportunity afforded him to appear in the bankruptcy court, there appears to be no natural justice in holding him bound by its adjudications. He is a stranger to the proceedings. Ordi-
39 narily one who asserts the binding force of a judgment by any court must show jurisdiction by that court over the person sought to be charged with the force of the judgment. He assumes the burden of proof on this point. Eastman v. Cooper, 15 Pick. 276, 285, 286. Bissell v. Wheelock, 11 Cush. 277, 279.

By the terms of s. 17 the discharge has the effect to bar a provable debt only when it was scheduled or the creditor had notice or actual knowledge of the proceedings. If these elements do not exist, then the creditor has no connection with the bankruptcy proceedings. A mere proffer of a discharge in bankruptcy, without facts to show that an unscheduled creditor by the terms of the act became subject to the jurisdiction of the bankruptcy court, does not make the discharge effective as to such creditor. As was pointed out in Birkett v. Columbia Bank, 195 U. S. 345, at page 349, "Section 7 of the bankrupt law of 1898 devolves a number of duties upon the bankrupt, all directed to the purpose of a full and unreserved exposition of his affairs, property and creditors. Among his duties he is required to 'prepare, make oath to, and file in the court * * * a list of his creditors, showing their residences, if known, if unknown, that fact to be stated, the amounts due each of them * * *.' To the neglect of this duty the law attaches a punitive consequence." Then follows a quotation of s. 17 *a* (3) hereinbefore set forth. That consequence could hardly be puntive if, when it had appeared that the bankrupt had failed signally in the performance of this
40 duty by omission in his schedules of any reference to a creditor or his claim, the creditor still had the burden of proof of showing that he was not affected by the discharge. It would seem to be necessary, in order to give a real "punitive consequence" to non-compliance with the requirements of the statute, to cast upon the bankrupt or his representatives the burden of proving that the discharge affected the creditor. It further was said in Birkett v. Columbia Bank, at page 350: "The provisions of the law relied upon by plaintiff in error [s. s. 7, 17, 38, 65] are for the benefit of creditors, not of the debtor." Since the discharge is for the benefit of the debtor and not of the creditor there would seem to be a defect in the law if the burden of proving negative consequences arising from the default of the debtor should be borne by the creditor and

not by the debtor. We think a correct construction of the law does not lead to such a result.

There is nothing in Kreitlein v. Ferger, 238 U. S. 21, as we understand it, at all inconsistent with this conclusion. It there is said at page 26, "There are only a few cases dealing with the subject but they almost uniformly hold that where the bankrupt is sued on a debt existing at the time of filing the petition, the introduction of the order makes out a prima facie defence, the burden being then cast upon the plaintiff to show that, because of the nature of the claim, failure to give notice or other statutory reason, the debt sued on was by law excepted from the operation of the discharge."

41 These words seem to us not to refer to the burden of proof but to the burden of evidence. See Powers v. Russell, 13 Pick. 69, 76; Central Bridge Corp. v. Butler, 2 Gray, 130, 132; Carroll v. Boston Elevated Railway, 200 Mass. 527, 536. See also 16 Cyc. 926, 932, 933, and cases there collected, and 10 R. C. L. s. 45, page 897, and cases there cited. The ruling made at the request of the defendant at the trial, as to the probative value of the discharge in bankruptcy, was in accordance with the statement quoted from Kreitlein v. Ferger. That opinion at pages 30, 31, referred to the burden of proof as to want of notice but held that it was unnecessary to decide the point. The view of the dissenting justices, as expressed at pages 35 to 38, appears to be unequivocal to the effect that the burden of proof to show that the creditor has notice or actual knowledge of the bankruptcy proceedings rests upon the party relying upon the discharge. The decision in Claflin v. Wolff, 98 N. J. L. 308, goes no further than Kreitlein v. Ferger.

It follows that in our opinion there was no error in the refusal to rule that the burden was upon the plaintiff to show that he was not notified and had no knowledge of the debtor's proceedings in bankruptcy.

There was no legal inconsistency or reversible error in ruling that the discharge in bankruptcy was on the facts prima facie evidence that the plaintiff's claim was scheduled and that the burden of producing some evidence to meet this prima facie proof rested upon the plaintiff and at the same time finding in favor of the plaintiff.

The plaintiff met the prima facie proof made out by the dis-

42 charge by proof from the record of the bankruptcy court that his debt was not scheduled by the bankrupt. The defendants having failed to show notice to or actual knowledge of the bankruptcy proceedings by the plaintiff, did not sustain the burden of proof resting upon them under their answer to show a discharge in bankruptcy effective as to the plaintiff.

Exceptions overruled.

42½ [Endorsed:] Smith vs. Hill. Certified copy of the Opinion of the Supreme Judicial Court.

43 COMMONWEALTH OF MASSACHUSETTS:

I, John A. Aiken, Chief Justice of the Superior Court of the Commonwealth of Massachusetts,

Do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this twenty-ninth day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

JOHN A. AIKEN,
Chief Justice of the Superior Court.

44 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

I, Francis A. Campbell, Clerk of the Superior Court within and for said County of Suffolk, hereby certify that the Honorable John A. Aiken, by whom the foregoing certificate was made, and who has thereunto subscribed his name, was at the time of making thereof, and still is, Chief Justice of the Superior Court of said Commonwealth, duly commissioned and qualified; to all of whose acts as such full faith and credit are and ought to be given, as well in courts of judicature as elsewhere.

In witness whereof, I have hereto set my hand and affixed the seal of said Court, this twenty-ninth day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

45 DONALD M. HILL et als., Executors of the Will of Warren M. Hill, Petitioners,

vs.

CHARLES S. SMITH, Respondent.

Stipulation.

It is hereby stipulated between the petitioners, Donald M. Hill, Jay R. Benton and George B. Billings, Executors of the will of Warren M. Hill, and the respondent, Charles S. Smith, that the transcript of record filed in the office of the Clerk of the Supreme Court of the

United States with the petition for Writ of Certiorari (No. 510 of October term, 1921), be taken as the return to said Writ dated the 19th day of November, 1921.

EDWARD E. BLODGETT,
Attorney for Petitioners.
EDWARD F. McCLENNEN,
Attorney for Respondent.

Dated this Seventh day of December, 1921.

45½ [Endorsed:] Suffolk Clerk's Office. Filed Dec. 20, 1921. Francis A. Campbell, Clerk Superior Court.

46 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Superior Court of the State of Massachusetts, Greeting:

Being informed that there is now pending before you a suit in which Charles S. Smith is plaintiff, and Warren M. Hill, Donald M. Hill, Calvin Austin and Henry C. Wiley, as Executors of William H. Hill, Alleged Trustees, are defendants, which suit was removed into the said Superior Court, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Superior Court and removed
47 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the nineteenth day of November, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

48 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

And now, here, the justices of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk, make return of this writ in a suit of record in said Court for said County wherein Charles S. Smith is plaintiff and Warren M. Hill was originally named as defendant, the death of said Warren M. Hill having been suggested on the fifth day of May, 1916, and Donald Mackay Hill, Jay R. Benton and George B. Billings, Executors of the will of said Warren M. Hill having appeared

on the thirteenth day of June 1916, in which suit Donald M. Hill, Calvin Austin and Henry C. Wiley "as they are the executors of the will of William H. Hill," were named as trustees, by annexing hereto and sending herewith, under the seal of the said Superior Court, a stipulation of the parties to said proceedings, by which it is provided "that the transcript of record filed in the office of the clerk of the Supreme Court of the United States with the petition for Writ of Certiorari (No. 510 of October Term 1921) be taken as the return to said Writ dated the nineteenth day of November 1921."

In testimony whereof I, Francis A. Campbell, Clerk of said Superior Court, have hereto set my hand and the seal of said Court this twenty-ninth day of December, A. D. 1921.

[Seal of the Superior Court.]

FRANCIS A. CAMPBELL,
Clerk.

[Endorsed:] (14) File No. 28,465. Supreme Court of the United States, October Term, 1921. No. 510. Donald M. Hill et al., Executors, etc., vs. Charles S. Smith. Writ of Certiorari. Suffolk Clerk's Office. Filed Dec. 20, 1921. Francis A. Campbell, Clerk Superior Court.

49 [Endorsed:] File No. 28,465. Supreme Court U. S., October Term, 1921. Term No. 510. Donald M. Hill et al., Executors &c., P. E., vs. Charles S. Smith. Writ of certiorari and return. Filed Jan. 3, 1922.

(5824)